

MEMO

FROM: LWJ

TO: LWJ

DATE: January 3, 2004

RE: SB270 Legal Research

The Legislature has the authority to create conclusive presumptions such as the one found at § 39-71-401(3)(c), MCA (1999).

A cardinal rule of statutory construction is codified at § 1-2-102, MCA, and provides:

. . . When a general and particular provision are inconsistent, the latter is paramount to the former, so **a particular intent will control a general one that is inconsistent with it.**

(Emphasis added.)

The interplay between § 39-71-102, MCA (1999) and § 39-71-401(3), MCA (1999) is directly in line with this Court's long-held rules of statutory construction, most recently stated in *Chain v. Montana Dept. of Motor Vehicles*, 2001 MT 224, ¶ 15, 306 Mont. 491, ¶ 15, 36 P.3d 358, ¶ 15:

In the construction of a statute, the Court is "not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Section 1-2-101, MCA; See *Hanson v. Edwards*, 2000 MT 221, ¶ 19, 301 Mont. 185, ¶ 19, 7 P.3d 419, ¶ 19 (when construing several applicable statutory provisions, effect should be given to all if possible). This Court presumes the legislature would not pass meaningless legislation, and must harmonize statutes relating to the same subject, as must as possible, giving effect to each. *Crist v. Segna* (1981), 191 Mont. 210, 212, 622 P.2d 1028, 1029. Statutory construction should not lead to absurd results if a reasonable construction will avoid it. *Gaub v. Milbank Ins. Co.* (1986), 220 Mont. 424, 428, 715 P.2d 443, 445 (citation omitted).

Sections 39-71-102 and -401(3) contemplate and govern separate and distinct fact patterns. Section 39-71-102 governs disputes about whether a person, *without a DOLI independent contractor exemption*, is in fact an independent contractor or an employee. Section 39-71-401(3) governs cases in which a person, *with a DOLI independent contractor*

exemption, claims to be an employee when injured. This interpretation gives full effect to both statutes, and recognizes that the specific intent of –401(3) controls the general intent of - 102.

The Legislature is vested with the authority to create conclusive presumptions.

Section 26-1-601, MCA, provides that “[t]he following presumptions are conclusive:”

(1) the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief;

(2) that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;

(3) the judgment or order of a court, which is declared by statute to be conclusive;

(4) *any other presumption which, by statute, is expressly made conclusive.*

(Emphasis added.)

The Compiler’s Comments to Title 39, Chapter 1, Part 6, sets forth dozens of statutes in which the Legislature has created conclusive presumptions. Additionally, the Compiler’s Comments clearly state that the list is not all- inclusive, that is, every statutory conclusive presumption may not appear in the list.

At § 39-71-401(3), MCA, the Legislature expressly created a conclusive presumption as contemplated by § 26-1-601(4), MCA. The Compiler’s Comments contained in the Annotations to § 39-71-401, MCA, set forth the specific legislative intent behind the statute:

Statement of Intent:

The statement of intent attached to HB 277 (Ch. 470, L. 1983) provided: "Under the law in effect prior to the enactment of this act, independent contractors were exempt from coverage under the Workers' Compensation laws. Many times, the determination of whether a worker is an independent contractor is made after a worker, for whom no contributions have been made, is injured and files a claim. *This act provides a method for a before-the-fact determination of the independent contractor status. The act is not*

intended to make independent contractors subject to the Workers' Compensation Act but requires that they apply for that status to be exempt.

This bill authorizes the Division of Workers' Compensation of the Department of Labor and Industry to adopt rules to implement this act. It is the intent of the Legislature that the Division will provide an application form and provide for a hearing if the applicant disagrees with the Division's initial determination. Any substantive rules adopted pursuant to this act must be consistent with the statutory definition of "independent contractor."

Section § 39-71-401(3) is not unconstitutional beyond a reasonable doubt.

Powell v. State Fund, 2000 MT 321, ¶13, 302 Mont. 518, ¶13, 15 P.3d 877, ¶13. The Court in *Powell* held:

The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt. *Stratemeyer v. Lincoln County*, (1993) 259 Mont. 147, 150, 855 P.2d 506, 508-09, cert. denied, 510 U.S. 1011, 114 S.Ct. 600, 126 L.Ed.2d 566 (1993) (citing *Fallon County v. State*, (1988) 231 Mont. 443, 445-46, 753 P.2d 338, 339-40). See also *State v. Lilburn*, (1994) 265 Mont. 258, 262, 875 P.2d 1036, 1039, cert. denied, 513 U.S. 1078, 115 S.Ct. 726, 130 L.Ed.2d 630 (1995). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Davis v. Union Pacific R. Co.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31 (citing *State v. Safeway Stores* (1938), 106 Mont. 182, 199, 76 P.2d 81, 84.

Powell at ¶ 13.

Section 39-71-401(3) does not deny a person's procedural due process rights.

This Court previously examined the procedural due process implications of conclusive presumptions in *Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992) (hereinafter *Yellowstone River*). In *Yellowstone River*, the Court upheld the conclusive presumption set forth at § 85-2-226, MCA, which provided:

The failure to file a claim of an existing right as required by 85-2-221 [claim filing for existing water rights deadline] establishes a conclusive presumption of abandonment of that [water] right.

The Court in *Yellowstone River* clearly and concisely applied the procedural due process analysis to the conclusive presumption in that case as follows:

The appellants contend the conclusive presumption of § 85-2-226, MCA, violates due process because it fails to provide an opportunity to rebut the presumption of abandonment. . . .

The Montana Legislature has defined, for the limited purpose of establishing existing water rights, that failure to file a claim will be construed as abandonment of that claim. Section 85-2-226, MCA. While this definition of abandonment does not appear to parallel this Court's previous definition of abandonment, it is within the province of the legislature to enact such a definition. Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. United States v. Locke (1985), 471 U.S. 84, 106, 105 S.Ct. 1785, 1798, 85 L.Ed.2d 64, citing Hawkins v. Barney's Lessee, (1831) 5 Pet. 457, 467, 8 L.Ed. 190.

. . . .

In Vlandis, the Connecticut Legislature created a conclusive presumption that a student was an out of state resident for tuition purposes if his address at the time of admission or in the year preceding admission was out of state. The Supreme Court determined this to be impermissible because students were not provided opportunity to rebut the presumption and because pre-admission addresses did not necessarily prove nor disprove residency. Vlandis makes it abundantly clear that:

a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. (Citations omitted.) Vlandis v. Kline, 412 U.S. at 446, 93 S.Ct. at 2233.

However, § 85-2-226, MCA, does not operate, as did the Connecticut statute, to deny opportunity to rebut. Water right claimants in Montana were all properly notified and had the opportunity to rebut the presumption of abandonment by filing a claim. In contrast, the Connecticut students had no recourse whatsoever and could do nothing to prevent the triggering of the presumption. The Court, in Vlandis, noted that a student's address

at the time of admission was an arbitrary method of determining residency.

Other examples of when the Supreme Court has struck down laws creating impermissible conclusive presumptions include a law providing that teachers are unable to perform their duties when they are more than 4 months pregnant, Cleveland Board of Education v. LaFluer (1974) 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52; and that unwed fathers are unfit to be parents, Stanley v. Illinois (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. These presumptions, as in Vlandis, created factual conclusions as a matter of law which the court ruled could only be accurately made through individualized determinations. As such, the conclusions were arbitrary and not necessarily true. **In the instant case, the legislative definition of abandonment, as used in § 85-2-226, MCA, does not require any individualized determinations. The definition applies the same to all people who filed after the deadline. The only individualized determination necessary is to establish whether the deadline was met. Hearings are already provided by the Water Court for this purpose.**

Yellowstone River, 253 Mont. at 175-176, 832 P.2d 1214-1215 (emphasis added).

Paraphrasing the emphasized language above, the following can be said:

In the instant case, the legislative definition of an exempted independent contractor, as used in § 39-71-401(3), does not require any individualized determinations. The definition applies the same to all people who apply for and receive an independent contractor exemption. The only individualized determination necessary is to determine whether the person applied for and received an independent contractor exemption. Hearings are already provided by the Workers' Compensation Court for this purpose.

Section 39-71-401(3) does not violate a person's substantive due process rights.

The Court in *Powell* discussed the right to substantive due process as follows:

Both the Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.

The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary

governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. Even though a plaintiff may have no property or liberty interest grounded in state law which is protected from arbitrary government action, such action still may be subject to review under substantive due process. Substantive due process primarily examines the underlying substantive rights and remedies to determine whether restrictions ... are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute.

Newville v. State, Dept. of Family Services (1994), 267 Mont. 237,249, 883 P.2d 793, 800 (citing J. McGuinness and L. Parlagreco, *The Reemergence of Substantive Due Process As A Constitutional Tort: Theory, Proof, and Damages* (1990), 24 New Eng. L.Rev. 1129, 1133).

"Substantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation." *Newville*, 267 Mont. at 250, 883 P.2d at 801 (quoting *Raisler v. Burlington N. R. Co.* (1985), 219 Mont. 254,263, 717 P.2d 535, 541). ***Since the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual, a statute enacted by the legislature must be reasonably related to a permissible legislative objective in order to satisfy guarantees of substantive due process.*** *Newville*, 267 Mont. at 250, 883 P.2d at 801 (citing *Raisler*, 219 Mont. at 263, 717 P.2d at 541). See also *Ball v. Gee* (1990), 243 Mont. 406, 412, 795 P.2d 82, 86; *In re C.H.* (1984), 210 Mont. 184,194, 683 P.2d 931, 936.

Powell at ¶28-29(emphasis added).

To withstand a substantive due process challenge, then, § 39-71-401(3) must be "reasonably related to a permissible legislative objective" and must not "take unreasonable, arbitrary or capricious action against an individual." It is clear from the Legislature's statement of intent that the statute is reasonably related to a legitimate governmental interest: to provide a "before-the-fact" determination of independent contractor status. Additionally, the conclusive presumption protects employers against persons who fraudulently induce the employer to hire them as an independent contractor and then, when injured, claim to be an employee.

Section 39-71-401(3) does not deprive an individual of the right to full legal redress.

Article II, section 16 of the Montana Constitution provides:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

In *Francetich v. State Compensation Mutual Insurance Fund* (1992), 252 Mont. 215, 220-221, 827 P.2d 1279, 1283, the Court explained the meaning of full legal redress and its implications as follows:

In 1989, this Court again had the opportunity to examine Article II, Section 16, in *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 776 P.2d 488. *Meech* involved a challenge to the Wrongful Discharge From Employment Act on the grounds that the Act violated an individual's fundamental right to full legal redress within the meaning of Article II, Section 16, of the Montana Constitution. In *Meech*, this Court concluded that full legal redress, as provided for in the Montana Constitution, means "the equal right to be made whole again by what the law defines as a cause of action and its elements." *Meech*, 776 P.2d at 498. **Further, it is up to the courts and the legislature to determine what constitutes available causes of action, remedies, and redress. Therefore, this Court held that there is no fundamental right to any particular cause of action, remedy, or redress.** Regarding the second sentence of the provision which specifically refers to full legal redress, the majority stated that "the delegates narrowly drafted the amendment to accomplish the single purpose of limiting the lawmakers' power in restricting third-party actions in workers' compensation law." *Meech*, 776 P.2d at 497.

The DOLI independent contractor exemption is the Legislature's determination, as endorsed by *Meech*, that a person working under that exemption when injured will not have workers' compensation benefits as a remedy for his injury.

Section 39-71-401(3) bars an individual from obtaining workers' compensation benefits from an insurer.

Rule 301(b), M.R.Evid., recognizes the affect of conclusive presumptions:
(b) Classification and effect of presumptions.
(1) Conclusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

The independent contractor exemption implements Art. II, §3 of the Montana Constitution.

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.